

No. 10,848

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMIL BALLEY,

Appellee,

VS.

JAMES TOZZI, doing business as James
Tozzi & Company,

Appellant.

APPELLANT'S REPLY BRIEF.

Appeal from the Judgment of the United States District Court,
Northern District of California, Northern Division.

Honorable Martin I. Welsh, Judge Presiding.

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Appellee, Balley, in his brief, devotes himself to the following arguments:

He first argues that the evidence shows that the market was advancing between March 15, 1940, and April 6, 1940, from ten cents (10¢) to twenty-five cents (25¢), and in support of this argument, he quotes the testimony of appellant and of himself.

His next argument is that the evidence shows that he could have resold the potatoes for two dollars (\$2.00) per sack to the Los Angeles Potato Distributors, and quotes portions of testimony to this effect.

Appellee then states that he is in accord with the statement of the measure of rule of damages set forth in appellant's opening brief; but, notwithstanding this, he argues that that, after all, is not the measure of damages in this case but it is the enhanced price received by the seller on a resale of the potatoes that is the measure of damages.

The other arguments, such as statute of frauds and f.o.b. defined, we do not deem it necessary to reply to in this brief, as those arguments were advanced before the District Court and found wanting by that Court. On page 31, et seq., of his brief, appellee, Balley, makes some attempt to show that he is entitled to the gross proceeds received by Tozzi on the resale of the potatoes as his measure of damages without deduction for selling expenses, brokerage and other ordinary expenses in connection with the sale of the potatoes by Tozzi.

Replying to Balley's first argument to the effect that the record shows the market price of the goods at the time and place of sale, to-wit: April 6, 1940, at Klamath Falls, Oregon, wherein Balley cites his own testimony to show the market price, we cite the following testimony:

Testimony of Emil Balley.

“Q. (by Mr. Smallpage). Now, I call your attention, Mr. Balley, to this portion of this letter wherein you stated:

‘I purchased potatoes from Streeter, and when I made the agreement the first time it was \$1.40 plus storage, and the second time I came back to

purchase said potatoes I had to pay \$1.45 and storage was not mentioned. I went to pay Streeter hereon the 3rd of April,' and so on.

Now, did you not in this letter refer to the potatoes the subject of this controversy?

A. (by Mr. Balley). It was the same potatoes, yes.

Q. So that, as a matter of fact, then, prior to this contract with Mr. Streeter on March 29, 1940, you had contacted him before and offered him a price of \$1.40 plus storage?

A. I did not offer him a price, no.

Q. Then did you get a quotation from Streeter?

A. I got a quotation from Streeter.

Q. And he told you definitely at that time he wanted \$1.40 plus storage for these particular potatoes, is that right?

A. The storage was mentioned, yes.

Q. And the price was mentioned?

A. That price was mentioned, yes.

Q. And what was the date of that conversation?

A. To the best of my knowledge, it might have been right around the 22nd or 23rd of March.

Q. In other words, then, about a week prior to this second conversation which led to the contract in question?

A. Yes.

Q. *Now, during that period of time did the potato market increase in price or decline?*

A. *Well, to the best of my knowledge, the potato market did not increase or did not decline.*

Q. It was stationary, then?

A. It was about stationary, yes." (Rep. Tr. pages 79-81.) (Italics supplied.)

And again on Rep. Tr. page 82:

“Q. What were you paying for potatoes up there to other sellers at that time?

A. I was buying, loaded f.o.b. cars between Malin and Klamath Falls, at \$1.40 per hundred.”

Again on Rep. Tr. page 85:

“Q. (by Mr. Smallpage). All right. Did it seem strange to you—withdraw that. When this quotation of \$1.40 plus storage was made by Mr. Streeter to you on or about March 22nd, did you think that price too high or too low?

A. (by Mr. Balley). *No, I didn't know much about the price right there. I had just got around to see about the potatoes, and I couldn't tell you whether it was too high or too low.*

Q. Did you buy any potatoes that day?

A. Yes, I believe I did.

Q. What did you pay for them?

A. I believe I paid \$1.25 naked.

Q. And what type of potatoes?

A. Sand-land potatoes.

Q. Is that the same type that Mr. Tozzi's potatoes were?

A. Yes, sir.

Q. You paid \$1.25 naked, which in sacks would be equivalent to \$1.35?

A. That is right.”

Again on Rep. Tr. page 92:

“Q. (by Mr. Smallpage). On April 6th? Now, in April when you and Mr. Streeter could not get together over the terms of this agreement for the purchase and sale of these potatoes, you immediately made a complaint, I take it, to the Agricultural Bureau?

A. (by Mr. Balley). Yes, there was a man suggested I take the deal up there.

Q. And to whom did you make that complaint?

A. To W. A. Hilgeson.

Q. And when was it you made that complaint?

A. I believe around the 14th day of April, but maybe later. That is the best of my knowledge.

Q. Had the market declined or the price at that time, or was it on the up grade?

A. The potato market?

Q. Yes.

A. *I couldn't tell you anything about the potato market. I was not well up on it. I was working on this and I didn't keep up with the market at all.*

Q. *I thought you were in touch with the potato market during this period.*

A. *I was in touch with the market but not at this time. After this controversy between Mr. Streeter and I, I didn't pay much attention to it at all. Most of my contacts were with attorneys to see if we could not get this matter settled."*

It seems to us that this testimony demonstrates clearly that the appellee, Balley, had no idea what the value of the potatoes was, as he testified clearly that he was not in touch with the market and couldn't tell anything about it.

As to Balley's argument that he had an offer from the Los Angeles Potato Distributors at \$2.00 a sack, the fact that Balley may have been able to resell the potatoes to some distributor in the State of California at an enhanced price is not the measure of damages, and this testimony is wholly irrelevant. We submit

that the appellee has failed to produce any evidence to show the market value of a like grade of potatoes at the time and place of sale, and that the rule of measure of damages adopted by the District Court is wholly incorrect.

In

Rice v. Schmid, 25 A. C. 254 (decided November 24, 1944),

the Supreme Court of California for the second time in the same case pointed out the correct measure of damages in a case of this kind, and in that case the lower Court, after the first reversal, did not follow the directions of the Supreme Court and the case was again reversed with specific directions to the lower Court.

It is respectfully submitted that the judgment of the District Court should be reversed.

Dated, Stockton, California,
December 13, 1944.

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